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ALEXANDER L. STEVAS,
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

DELAWARE RIVER BASIN
COMMISSION, ET AL.,

Respondent

v.

BUCKS COUNTY WATER AND SEWER AUTHORITY,

Petitioner

**BRIEF OF THE DELAWARE RIVER BASIN
COMMISSION IN OPPOSITION
TO PETITION OF BUCKS COUNTY
WATER AND SEWER AUTHORITY
FOR WRIT OF CERTIORARI**

On Writ of Certiorari to the United States Circuit Court
of Appeals for the Third Circuit.

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I. COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

A. WHETHER THE CONSITUTIONALITY OF SECTION 15.1(b) OF THE DELAWARE RIVER BASIN COMMISSION COMPACT (PUBLIC LAW 87-328, 75 STAT. 688) WOULD BE PROPERLY BEFORE THIS COURT FOR CONSIDERATION SHOULD THE PETITION FOR CERTIORARI BE GRANTED IN VIEW OF PETITIONER'S FAILURE TO PRESERVE THIS ISSUE BEFORE THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

B. WHETHER PETITIONER HAS RAISED ISSUES OF SUCH PARAMOUNT CONSTITUTIONAL CONCERN AS TO COMPEL FURTHER JUDICIAL REVIEW OF THE EXEMPTIONS OF PRE-COMPACT WATER USERS BY THE DELAWARE RIVER BASIN COMMISSION WHEN SUCH AN EXEMPTION IS BASED UPON FEDERAL LAW AND PETITIONER HAS NOT ARGUED THAT THE COMMISSION DID NOT ACT IN ACCORDANCE WITH THIS LAW.

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STATEMENT OF THE CASE

The Delaware River Basin Commission (DRBC) was created by a Compact enacted in 1961. The parties to the Compact were the States of Delaware, New Jersey and New York and the Commonwealth of Pennsylvania and the United States of America. (A-4) The federal government did not merely consent to this interstate Compact but enacted the Compact as a Federal Law, including as a part thereof Section 15.1 in which the United States set forth the conditions and reservations upon which it became a signatory party and participating member of the Compact. (A-124)

The DRBC is responsible for the conservation, development and management of the waters of the Delaware River Basin. DRBC was created by the parties to the Compact to be the agency for resolving interstate differences over the waters of the Basin and in an effort to avoid the continuation of litigation between the States of the Basin, the most recent of which reached this Court in 1954. *New Jersey vs. New York*, 347 U.S. 995.

In 1974, DRBC adopted Resolution 74-6 which provided for a system of water supply charges to provide funds to pay for the cost of certain water supply projects and certain other costs of the Commission. (A-134 to A-142) This Resolution imposed such charges on all water users of the Basin except for pre 1961 water users which were required to be exempted by federal law. This exemption, set forth in Section 5-1.3 of the Resolution, provides that pre-Compact water users need not pay water charges based upon the provision inserted by the federal government, Section 15.1(b) of DRBC's Compact, which provides:

"No provision of Section 3.7 of the Compact shall be deemed to authorize the Commission to impose any charges for water withdrawals or diversions from the Basin if such withdrawals or diversions could

lawfully have been made without charge on the effective date of the Compact. . ."

The authority of DRBC to impose water charges and the validity of Resolution 74-6 was litigated and upheld in *Borough of Morrisville vs. Delaware River Basin Commission*, 339 F.Supp. 469 (E.D. Pa. 1975) aff'd per curiam 532 F2d 745 (3rd Cir. 1976).

The present action was initiated by DRBC against Bucks County Water and Sewer Authority (Bucks County), a local agency created after 1961, and the City of Philadelphia (Philadelphia) to force the defendants to pay water user charges assessed pursuant to Resolution 74-6 for the water used by Bucks County. Bucks County purchases water from Philadelphia for sale to its customers. Philadelphia obtains its water supply directly from the Delaware and Schuylkill Rivers.

Bucks County contended before the U. S. District Court that it was not subject to water charges because Philadelphia held a "legal entitlement"¹ from DRBC which exempted it from water charges under the Resolution. Bucks County insisted that it fell within the City's exemption. Philadelphia denied that Bucks County was within its exemption. The City argued that any responsibility for water charges was exclusively that of Bucks County and cross-claimed for indemnity. DRBC took the position that Philadelphia's exemption from water charges was limited to sales of water to its residents. At oral argument, Bucks County also raised the issue of equal protection contending the exemption granted to pre-Compact water users was unconstitutional.

The District Court ruled that Philadelphia's legal entitlement was for the benefit of its residents only and did not extend to Bucks County. It also rejected the ar-

1. DRBC has issued "entitlements" for the limited purpose of determining exemptions from water charges. Such "entitlements" do not extend to any other "rights" to the waters of the Delaware Basin.

gument that Section 15.1(b) violated the provisions of equal protection. *Delaware River Basin Commission vs. Bucks County Water and Sewer Authority*, 474 F.Supp. 1249, 1255 (E.D. Pa. 1979).

Judgment was entered in favor of DRBC against both Bucks County and Philadelphia. As between the defendants, it was eventually stipulated that any liability for water charges would be the responsibility of Bucks County.

Bucks County abandoned on its initial appeal all challenges to the holdings of the District Court except a constitutional argument based upon an alleged violation of the equal protection provision. (A-32) The Court of Appeals held that Bucks County did not frame its constitutional challenge as an attack upon Section 15.1(b) of the Compact itself but limited itself to the argument that Resolution 74-6 implemented the Compact's grandfather clause in an unconstitutional manner. (A-32) The Court of Appeals also found that Bucks County did not contend "that in enacting Resolution 74-6 the Commission exceeded its powers under the Compact." (A-33) The majority of the appeal panel, however, directed that this matter be remanded for the limited purpose of determining whether DRBC's Resolution 74-6 implemented Section 15-1(b) of the Compact in an unconstitutional manner.

On remand, the District Court granted leave to intervene to the 12 parties that applied. (A-25) These included the States of New Jersey and New York, the Commonwealth of Pennsylvania, several steel companies and other private water users who joined with DRBC and Western Berks Water Authority which joined with Bucks County. A substantial group of documents were developed concerning the legislative history of DRBC's Compact which were presented to the District Court. Based upon this record, the briefs and oral argument, the District Court on March 26, 1982, again entered an order rejecting Bucks County attack upon

Resolution 74-6. (A-3) Bucks County and intervenor Western Berks Water Authority were unsuccessful on appeal (A-73) and in their petition for a rehearing. (A-74)

ARGUMENT

A. The constitutionality of Section 15.1(b) of the Delaware River Basin Compact was not raised below and is not properly before this Court now.

Petitioner contends that it challenges the constitutionality of Section 15.1(b) of DRBC's Compact. Although this issue was raised by petitioner at the initial hearing before the U. S. District Court, it abandoned this argument on its first appeal. The Court of Appeals, in its 1981 opinion, defined the issue before it as follows:

"On appeal, the Authority challenges the District Court's holding on the equal protection issue. The Authority does not frame its constitutional challenge as an attack on Section 15.1(b) of the Compact, however. Instead, it maintains that Resolution 74-6 implements the Compact's "grandfather" provision in an unconstitutional manner." (A-32)

The District Court, in the opinion issued following the rehearing, specifically noted that Section 15.1(b) was "a provision not challenged in the Court of Appeals and not open to challenge here." (A-23)

The validity of this section of the Federal Law, therefore, was not before the District Court on remand nor was it subject to reargument when Bucks County appealed the 1982 District Court decision.

B. The arguments of petitioner concerning the constitutionality of Resolution 74-6 are without merit.

Since petitioner cannot contest the validity of 15.1(b) itself, there is no valid basis for its argument that DRBC acted improperly by including within Resolution 74-6 an exemption for pre-61 water users. The exemption of pre 1961 water users was mandated by Congress in Section 15.1(b) and the omission of such an exemp-

tion by DRBC would have been in direct contravention of Federal Law. Petitioner, therefore, cannot contend that the exemption of pre 1961 water users in Resolution 74-6, in and of itself, is unconstitutional. Nevertheless, the only reasons supporting its argument that Resolution 74-6 improperly implemented the provisions of 15.1(b) that have been offered by Petitioners are based solely on the fact that 1961 water users have been exempted. Petitioner does not discuss the manner in which Resolution 74-6 implements the Compact exemption nor does it set forth an argument concerning the alleged constitutional shortcomings of the exemption provision in the Resolution. In the absence of any discussion of this issue, petitioner certainly has failed to set forth compelling reasons for this matter to be reviewed by this Court.

C. To the extent that the exemption of pre 1961 water users by Federal Law is subject to further judicial consideration, such an exemption is consistent with prior decisions of this Court and is a valid Congressional act.

1. In *Arizona v. California*, 373 U.S. 546, 563 (1963), this Court recognized the difficult nature of interstate disputes concerning water rights and stated its clear preference that, where possible, States settle their controversies by "mutual accommodation and agreement." In this case, congressional language protecting "present perfected rights" was approved. 373 U.S. at 581.

DRBC submits that Congress has not gone beyond its traditional and recognized role in enacting Section 15.1(b). The limitation on DRBC's right to charge users who were lawfully entitled to use water without charge when the Compact was adopted is completely consistent, in terms of recognized class or regulatory scheme, with many other water laws approved by the Congress

and upheld by this Court. Congress has repeatedly recognized existing or vested water rights and accorded them special treatment. For example, 43 U.S.C. §315(d) requires grazing permits issued by the federal government to recognize prior water rights. 43 U.S.C. §383 recognizes "vested rights" in connection with Federal Reclamation and Irrigation Acts. Finally, the Boulder Canyon Project Act, 43 U.S.C. §617(e), required the satisfaction of "present perfected rights" of certain water users.

The exemption of pre 1961 water users from water charges in DRBC's Compact is fully in accord with these other federal enactments and consistent with the holding of this Court in *Arizona v. California*, *supra*.

2. The standard of constitutional review to be applied in determining whether the exemption of pre 1961 water users violates the equal protection obligation imposed by the Due Process Clause of the Fifth Amendment is the minimal judicial scrutiny or rational basis test. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 (1981); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 175 (1980). *Vance v. Bradley*, 440 U.S. 93, 97 (1979). The scheme of charges and exemptions authorized in Section 15.1(b) and implemented by Resolution 74-6, can be found to violate equal protection only if it bears no rational relationship to a legitimate state purpose.

This Court has made it clear that a social or economic regulation or statute will be upheld against equal protection challenges if it is "rationally related to furthering a legitimate state interest." *Vance v. Bradley*, 440 U.S. at 97, quoting *Massachusetts Br. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). If the classification has some reasonable basis, it will be upheld even if in practice it results in some inequality. *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970).

Moreover, the equal protection obligation "is not an obligation to provide the best governance possible."

Schweiker v. Wilson, 450 U.S. 221, 230 (1981). Absent invidious discrimination or infringement upon a fundamental right (and no such claim has been made in this case), this Court has repeatedly recognized that there is a limited review power over Congress as to social or economic legislation. *Schweiker v. Wilson*, *supra* 450 U.S. at 230. *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. at 175. See *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

Recent pronouncements on equal protection analysis of social and economic statutes or regulations state that such analysis comes to an end when it is determined that there are plausible reasons for Congress' action and that Congress did not achieve its purpose in a "patently arbitrary or irrational way." *Fritz*, *supra*, 449 U.S. at 177. It is "constitutionally irrelevant" whether such plausible reasons in fact underlay the legislative decision because it is not necessary for Congress to articulate its reasons for enacting a statute; it is sufficient if a court can hypothesize or postulate reasons for the statute. *Id.*; *Flemming v. Nestor*, 363 U.S. 603, 612 (1960).

In the sphere of local economic regulation, it is only the "invidious discrimination" or "the wholly arbitrary act" which violates the Equal Protection Clause, *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976):

"When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to the legislative determinations as to the desirability of particular statutory discriminations"**** Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation

of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude.

DRBC submits that the District Court in its several opinions set forth several plausible reasons to support or justify the enactment of Section 15.1(b). Moreover, the recognition of existing rights to use the waters of the Basin without charge, in and of itself, is a valid state purpose and falls within the discretion vested in the Congress.

3. Petitioner would seek to place before this Court alleged political purposes to explain the inclusion of Section 15.1(b) within DRBC's Compact. To advance this argument, petitioner contends that Section 15.1(b) was included within the Compact in order to provide sufficient political support to enable the Compact to obtain federal approval. DRBC has argued below and would argue to this Court that the record does not support the suggestion that the Compact would not have been passed by the Congress without the inclusion of Section 15.1(b) or that the Section was inserted solely for that reason. Neither the official or unofficial documents comprising the record of this case provide a basis for determining the actual motivation of Congress, even assuming an inquiry into the motives of Congress was proper. This Court, however, has long recognized that such an inquiry is not appropriate for the judiciary and does not provide a valid basis for declaring legislation unconstitutional. *U. S. v. O'Brien*, 391, U.S. 366 (1968).

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be dismissed.

Respectfully submitted,

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